No. 21033

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, For the Use and Benefit of CHICAGO BRIDGE & IRON COMPANY, an Illinois corporation,

Appellant,

vs.

ETS-HOKIN CORPORATION, a California corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation,

Appellees.

On Appeal from the United States District Court for the District of Arizona

Appellant's Opening Brief

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31, 1966. T.R. 69. Notice of Appeal was filed on March 25, 1966. T.R. 180. Timely orders extending the time for filing the Record on Appeal were made on March 4, 1966, June 13, 1966 and July 22, 1966 by which the time for filing the Record on Appeal was extended to September 1, 1966. The Record was filed with this Court on August 26, 1966. The jurisdiction of the Court to determine this appeal rests on 28 U.S.C. Section 1291 and 1292.

II.

STATEMENT OF THE CASE

A. Transaction Giving Rise to This Action.

On or about August 22, 1962, Appellee, Ets-Hokin Corporation, (then known as Ets-Hokin & Galvan, Inc., a corporation and hereinafter sometimes referred to as Ets-Hokin) and Appellant (hereinafter sometimes referred to as CB&I) entered into a Subcontract Agreement (Exhibit "A" to Motion For Stay of Action Pending Arbitration, Tr. 11, and Chicago Bridge & Iron Company General Specifications which are a part of Appellant's Exhibit 83 attached to Reporter's Transcript of Arbitration Proceedings (RTAP)), wherein CB&I agreed to perform certain construction work called for under the Ets-Hokin's general contract with the United States Bureau of Reclamation for the completion of the Glen Canyon Dam Project, Page, Arizona. (The general contract is technically identified as Contract No. 14-06-D-4429, and the specifications thereto are referred to as Specification No. DC-5750. In addition to the general contract and the specifications, there was a Bid Schedule which for bidding purposes constituted a breakdown of the work and material set forth in the specifications.) The Subcontract covered all the general contract work under Bid Schedule Items 129 and 130, and a certain portion of the work under Item 79.

During the course of the Subcontract, a dispute arose between CB&I and Ets-Hokin as a result of a demand by the latter that the former perform certain general contract work included under Bid Schedule Item 79 generally described as the cooling and prestressing of the spiral cases.

These spiral cases are the metal conduits by which the water from the penstocks is carried immediately into the turbines in the power plant below the dam. Graphically, the cases connect up with the penstocks, which bring the water from the reservoir behind the dam, and lead to and fit closely around the individual turbine units. The spiral cases are embedded in concrete and it is during this embedment that the general contract specifications under Item 79 require the cases to be filled with water and then placed under a certain pressure. The temperature of the water and the pressure within the cases must be maintained for certain periods during and after the placement of the concrete.

CB&I refused to do this work upon the grounds that its Subcontract did not require it to do so, declaring that it was obligated only to perform those work items specifically outlined in the Subcontract under Item 79 (See Attachment to Subcontract, Tr. 13). Ets-Hokin then proceeded to do the work and to backcharge CB&I therefor.

Subsequently, on July 7, 1964 CB&I filed the lawsuit below to collect the sum withheld as backcharges, and Ets-Hokin's bonding company, Appellee Travelers Indemnity Company, was joined as a defendant under the terms of its bond and 40 U.S.C. 270 et seq.

B. The Case in the District Court.

The complaint in the lower court alleged that the Defendant Ets-Hokin had wrongfully retained from subcon-

tract proceeds payable to CB&I the sum of $33,167.41 as and for backcharges to cover costs of prestressing of the spiral cases incurred by it; and that Ets-Hokin was threatening to withhold additional sums, which in fact it did, so that as of this date the total backcharges for prestressing costs amount to $37,077.56.

Immediately after the complaint was filed, Ets-Hokin served by mail a Demand for Arbitration upon CB&I under a letter dated August 14, 1964, Tr. 15, invoking Article 23 of the standard printed form of its Subcontract. This Article provides:

> "ARBITRATION: In case of any dispute between the parties as to the interpretation of this agreement or as to a change in the Subcontract price of Subcontract time due to the issuance of a change order, or with respect to any other matter arising out of or in connection with this Subcontract or its performance, either party may demand that the dispute be submitted to arbitration. The demand shall be in writing, shall be served on the other party and shall specify the arbitrator chosen by the party making the demand. Within 7 days after receipt of the demand, the other party shall appoint an arbitrator, by written notice served on the party making the demand. The two arbitrators so chosen shall select a third arbitrator. The decision of any two arbitrators shall be binding and conclusive on the parties, shall be in writing and shall be a condition precedent to any right of legal action. In no case shall submission of a matter to arbitration be a cause for delay or discontinuance of any part of the work. Each party shall bear the expense of its own arbitrator and the expense of the third arbitrator and other costs of arbitration shall be divided equally between the parties."

On August 21, 1964, Ets-Hokin filed in the lower court a Motion For Stay of Action Pending Arbitration, and cited

as authority for the motion, Section 3 of the *United States Arbitration Act,* 9 U.S.C. 3, which provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

CB&I opposed the Motion For Stay of Action, Tr. 20-26, but on October 26, 1964 the District Court granted the Ets-Hokin motion, Tr. 27.

Thereafter, the dispute proceeded to Arbitration before three arbitrators who held a hearing in San Francisco on July 6, and 7, 1965. (See Reporter's Transcript of Proceedings hereinafter referred to as RTAP.) On or about August 30 or September 1, 1965, two of the three arbitrators rendered their award including therein an opinion, Tr. 54-57.

On November 24, 1965, CB&I filed a Motion To Vacate The Stay Order entered by the Arizona District Court on October 26, 1964 and also filed as an alternate, a Motion To Vacate The Arbitration Award, Tr. 28. The motions were opposed by Ets-Hokin. The Court heard oral argument and on January 31, 1966 denied both of the CB&I motions, Tr. 69. Subsequently, this appeal was taken as previously stated.

Likewise, this Court should be aware of the fact that, in order to preserve its rights under Section 10 of the Arbitration Act on November 29, 1965, CB&I filed in the United

States District Court, Northern District of California, matter No. 44430, entitled Application for Order to Set Aside Arbitration Award. On December 20, 1965, Appellees also filed in the United States District Court, Northern District of California, matter No. 4452, entitled, Petition to Confirm Arbitration Award. These matters were consolidated for a hearing held before the Hon. Judge Zirpoli on March 30, 1966. These matters are still awaiting the decision of that Court.

SPECIFICATION OF ERRORS

The rulings of the United States District Court, District of Arizona (Phoenix Division), the correctness of which Appellant submits to this Court for review, are as follows:

A. Specification of Error No. 1.

The District Court erred in ruling that Appellant was not entitled to have the Stay Order of October 26, 1964 vacated so that it could proceed with the prosecution of its claim against the Appellees before the said District Court. The Court reasoned that Article 23 of the Subcontract, providing for arbitration of disputes between the parties thereto, and the policy of the United States Arbitration Act favoring the enforcement of Arbitration clauses, overrides the right granted to the Appellant under the *Miller Act* (40 U.S.C. 270) to file and prosecute to judgment its claim against Ets-Hokin and its surety, Travelers Indemnity Company, in said District Court.

B. Specification of Error No. 2.

If the District Court was correct in sustaining its Order of October 26, 1964, then it erred in refusing to vacate the Arbitration Award upon the grounds that it did not have the jurisdiction to entertain Appellant's Alternate Motion

to Vacate the Arbitration Award. The Arizona District Court apparently based its conclusion upon the fact that the Arbitration Award had been entered in San Francisco, California, which fact, according to Appellee's argument to the Court, under the United States Arbitration Act gave exclusive jurisdiction of the Motion to the United States District Court for the Northern District of California. Appellant contends that as the Court of original jurisdiction of the dispute, the Arizona District Court had the jurisdiction to hear and determine matters concerning the Arbitration Award.

SUMMARY OF ARGUMENT

A. Miller Act v. United States Arbitration Act.

Appellant contends that under the *Miller Act*, supra, it has the right to prosecute its claim against the Appellees for the wrongful backcharges in the United States District Court, District of Arizona. It argues that the *Miller Act* grants to the Appellant the right to have a judicial determination of its claim against Ets-Hokin and its surety, Travelers Indemnity Company, which right overrides the arbitration provision of the Subcontract (Article 23) and the policy of the United States Arbitration Act. Appellant will argue that its right of recovery against the Appellees would be seriously impaired by arbitration and proposes to demonstrate the impairment by reference to the actual arbitration that took place in this instance. Further substantiation of Appellant's contention is to be found in the fact that vindication of Appellant's rights requires a legal construction of the Subcontract, something which three laymen are not trained to do.

B. Jurisdiction of the Arizona District Court.

Appellant contends that 9 U.S.C. Sections 10 and 11, (United States Arbitration Act) do not confer exclusive jurisdiction upon the District Court for the Northern District of California to vacate, modify or correct the Arbitration Award, and that these sections of the statute are more in the nature of venue provisions. The gravamen of the dispute in both the District Court and the Arbitration proceeding was the *Miller Act* rights of the Appellant, and under the *Miller Act,* the District Court in Arizona was the proper forum. Since the Arizona District Court was properly vested with jurisdiction over the original dispute, it can justifiably retain jurisdiction over the arbitration.

ARGUMENT

MILLER ACT v. ARBITRATION ACT

Right Granted by Congress to Judicial Determination of Miller Act Claim Cannot Be Waived in Advance by Parties or Overridden by Policy of Federal Arbitration Act.

A. The Issue.

Admittedly, it is the intent of the Federal Arbitration Act to give effect to agreements for arbitration and within the boundaries of Federal jurisdiction, to countermand the traditional legal precedents against enforcement of arbitration agreements. The Federal Arbitration Act was enacted in 1925. Ten years later, on August 24, 1935, the Miller Act was enacted into law. This Act superseded and repealed previous legislation known popularly as the *Heard Act,* Chapter 280, 28 Stat. 278. This latter Act had provided only one bond for the benefit of both the United States and the subcontractors and materialmen, and subcontractor's rights under this bond were subordinate to the rights of the United States (House Report 1263, 74th Cong. 1st Session, June 19, 1935). Under the Miller Act, a separate

bond was provided for the benefit of the subcontractors who could, if not paid within ninety (90) days of the completion of their work, bring suit on the bond in the District Court where the contract was to be performed and executed (40 USCA 270 b(a) & (b)).

The question, therefore, before the Court on this Appeal is: Can a subcontractor be precluded from exercising his rights under 40 USCA 270 b(a) & (b) by a previous agreement contained in the small print of a printed form of subcontract requiring the subcontractor to arbitrate all disputes arising under the subcontract?

B. Arbitration Is Prejudicial to Miller Act Rights.

It was the position of the Appellant originally in opposition to the Ets-Hokin Motion For Stay of the District Court proceedings that arbitration would prejudice the rights secured to it under 40 USCA 270 b(a) & (b), in that vital and complex legal questions would be determined by an untrained panel of laymen, rather than by a duly appointed and qualified Federal judge. Appellant's claim does not and did not merely involve the reasonableness or unreasonableness of the sums claimed by Ets-Hokin as backcharges. The outcome of Appellant's claim depends upon the application of the Law of Contracts and the adoption of appropriate rules of construction to Appellant's Subcontract with Appellee, Ets-Hokin Corporation. At the time of the Ets-Hokin motion, Appellant pointed to the case of *Wilko v. Swan,* 346 US 427 (1954) and *Electronic & Missile Facilities Inc. v. U.S. ex rel. Moseley,* 306 F.2d 554 (5th Cir. 1962) for the proposition that where the Miller Act dispute involved complex or sophisticated legal issues which cannot be readily resolved by Arbitrators untrained in the law, the Appellant's right to sue under the Miller Act should prevail over the Appellee Ets-Hokin's

claim for Arbitration under the Federal Arbitration Act.

As Judge Goddard noted in *Wilko v. Swan,* 107 F.S. 75 D.C. So., New York), Section 3 of the Federal Arbitration Act does not authorize the Court to stay an action unless it is "satisfied that the issue involved in such suit is referable to arbitration." From time to time, Courts have, either upon grounds of public policy as in the *Wilko v. Swan* case, or upon grounds that the particular issues do not lend themselves to arbitration; *Zip Mfg. Co. v. Pep Mfg. Co.,* 44 F.2d 184 (D.C. Del., 1930) refused to enforce arbitration agreements. In fact, the arbitration process, as established in the Arbitration Act, is designed primarily for the determination of business and commercial disputes. The statute in bill form was submitted to Congress under the sponsorship of the Committee on Commerce, Trade and Commercial Law of the American Bar Association. In an article on the *Federal Arbitration Act in 12 Virginia Law Review* 265, 281, Mr. J. H. Cohen, who for many years took an active part in advocating arbitration legislation in the United States, said:

> "Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of the law —the questions of law which arise out of the daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned."

Turning purely legal issues over to arbitrators untrained in the law would operate in this instance to Appellant's

prejudice precisely because Appellant's claim and rights are primarily dependent upon a proper formulation and application of the law of contracts to the Appellant's Subcontract. Expertise in law rather than a purely technical engineering background is a prime requirement for a just decision in this controversy. This is one of those cases in which arbitration authorities, themselves, have expressed doubt.

> "The power to disregard rules of procedure and evidence out of law, which is one of the great advantages of proper arbitration, is capable of becoming an instrument of abuse and oppression in such hands, (i.e., in the hands of laymen)—just as a motor car driven by an unskilled . . . driver can do great damage." *Handbook and Guide to Commercial Arbitration,* pub. by Chamber of Commerce of the State of New York (1932) p. 6.

Admittedly, technicians in the hydro-electric plant construction industry are competent and desirable judges of such issues as custom and usage in the industry, labor costs, the functions of various trades and the significance and relation of specific construction processes to the overall construction process. But substantial legal issues, such as "burden of proof", "parol evidence", "the doctrine of merger in contracts", "competency of witnesses" and "promissory estoppel" and rules governing construction of vague phrases such as "including but not limited to" were involved in the present dispute and were extremely important to the right of the Appellant to recover upon the payment bond of the Appellee, Ets-Hokin Corporation.

For example, in the Arbitration hearing, Appellant put on what in a courtroom would have been its case-in-chief, i.e. introduction of the basic Subcontract, testimony as to

its performance and the refusal of Ets-Hokin to pay the amounts withheld as backcharges. Appellant then asked the Board for an award, arguing to the Board that the Subcontract was clear and unambiguous and that, unless the Appellee, Ets-Hokin could demonstrate that it was vague, uncertain and ambiguous, or, without going outside the terms of the Subcontract demonstrate prestressing of the spiral cases was a part of the Subcontract work, Appellant should be entitled to an award in the sum of the backcharges. The Board chose not to consider the question of whether the Subcontract was vague and ambiguous or whether prestressing was a part of the Subcontract as written, but proceeded to hear and take evidence that was extrinsic to the written Subcontract; namely, the various proposals of the Appellant that resulted in the written Subcontract, and cross-examination of the Appellant's witness concerning conversations and events during subcontract negotiations. The parol evidence rule was flagrantly violated as the whole history of the Subcontract's negotiation and the duties of Appellant under other subcontracts not involving Ets-Hokin came into the record. The doctrine of the merger of all prior understandings and agreements in the final written Subcontract was completely ignored.

It was this disregard of legal procedure, concepts and rules throughout the arbitration which operated to Appellant's prejudice. Under the arbitration process, one cannot appeal to have the award set aside because the parol evidence rule, or the doctrine of merger of contracts or the rules as to who has the burden of proof are misconstrued, misapplied or ignored. As noted, in *Wilko v. Swan,* supra, and affirmed in *Bernhardt v. Polygraphic Co.,* 350 U.S. 198:

> "Interpretations of the law by the Arbitrators are not subject, in the Federal Courts, to judicial review

for error in interpretation. The U. S. Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English Law. (Wilko v. Swan at 436, 437)".

And again, to quote the Court in the *Bernhardt case,* supra:

"The change from a Court of Law to an Arbitration panel may make a radical difference in the ultimate result . . . arbitrators do not have the benefit of judicial instruction in the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a Court trial; and judicial review of an award is more limited than judicial review of a trial."

Instead, the Court is limited to the grounds set forth in Sections 10 and 11 of the Federal Arbitration Act:

Section 10. Same; vacation; grounds; rehearing

"In either of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made

has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

Section 11. Same; modification or correction; grounds; order

"In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

As an abstract proposition, that statutory rights may be impaired if subject to the erroneous legal conclusions of a lay arbitration board, which are not subject to review by an appellate court, need hardly be demonstrated, particularly where the claim or right involves the legal construction of a statute and a contract. However, the instant case offers a vivid demonstration if such is needed.

The Supreme Court in *Wilko v. Swan,* supra, felt that the rights of a purchaser against a seller under the Securities Act of 1933 to be effectively secured required judicial enforcement:

"Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness

> in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' . . . cannot be examined."

And Chief Judge Tuttle in his majority opinion in the case of *Electronic & Missile Facilities, Inc. v. U. S. ex rel. Moseley,* supra, at Page 557 conceded:

> "If it could be shown that disputes arising under the Miller Act involve complicated and sophisticated legal issues which cannot be readily resolved by arbitrators untrained in the law, we would perhaps be more willing to read into the Miller Act provision giving Appellee the right to sue in the federal courts a prohibition against having the dispute settled anywhere else. But such is not the case. This dispute involves nothing more than the rights and liabilities of two business concerns under ordinary business contracts."

This thesis of the arbitrators' inability to handle the legal issues involved in this dispute was advanced by Appellant in its original opposition to the Ets-Hokin Motion For Stay of Proceedings, Tr. 6. It was not as susceptible of concrete demonstration at that time as it is now when the arbitration proceedings are available for examination.

The apparent lack in the arbitrartors' understanding of the parol evidence rule, the concept of the burden of proof

and the doctrine of merger of prior agreements obviously led them into the confusion which resulted in their award and findings. Unable to relate the pertinent issues raised by Appellant's complaint below, Tr. 1-5, and the Ets-Hokin Demand For Arbitration, Tr. 15-17, under the plethora of evidence, much of it incompetent and immaterial to these issues, to the decision they were called upon to make, the Board ended up concluding that Appellant had not agreed to do the prestressing in its Subcontract, but that, nevertheless, it should be bound by an oral offer made prior to the final Subcontract negotiations (See paragraphs 8, 11 and 12 of the Arbitration Award Tr. 55 and pages 82-89, Vol. 1, RTAP).

Appellant made many efforts to impress upon the arbitrators that their primary function was to determine whether or not the subcontract of August 22, 1962 required the Appellant to perform the prestressing work outlined under paragraph 208g(2) of the specifications to the general contract (See page 337 of Defendant's Exhibit "B", RTAP). This was the reason why the Appellant stressed the importance of the parol evidence rule; namely, to keep the arbitrators' attention focused on the Subcontract document. (See pages 13, 15, 19, 20, 26, RTAP.) At the very beginning of its closing statement, Appellant reminded the Board to keep its attention on the Subcontract Agreement (See pages 309, 310, RTAP).

No doubt it was just such insistence on the Appellant's part, which impelled the Board to its finding that Appellant, under the written Subcontract, had not agreed to do the prestressing. See paragraphs 8 and 12, Tr. 55. Equally, however, it was the Board's inability to appreciate the legal consequences of such a finding which led it to enter an award against the Appellant. Such a result, Appellant

submits, would never have occurred in a Court of law upon such findings; or, if it had, such a result would never survive an appeal.

Appellant argued its case to the Board on the theory that the prestressing work was not called for by the written Subcontract and Appellees advanced their case on the theory that the disputed work was called for by the written Subcontract, arguing that the phrase "shall include but not necessarily be limited to the following", Tr. 11, referred to the prestressing items which, though not enumerated in the Subcontract attachment, Tr. 13, were a subcontract obligation (See pages 16, 74, 75, 76, 105, 106, 322, 323, RTAP). The arbitrators apparently agreed with the Appellant's theory, but still found that the Appellant was obligated to perform the prestressing because of the earlier oral offer which the evidence showed was not accepted either orally or in writing by any officer of the Appellee Ets-Hokin authorized to accept such an offer in a binding agreement.

The only competent evidence in the record on the question of whether the parties had ever at any time reached an agreement as to the cooling and prestressing work involved two conversations: one between J. Graham Daniels, the CB&I contracting officer and Paul Ristine, the Ets-Hokin project foreman; and the other between Daniels and Louis Bruni, a Vice President of Ets-Hokin. It was Bruni who eventually awarded the Subcontract to Daniels.

Early in the Subcontract negotiations, Daniels made an offer to do the prestressing to Ristine if this would secure to CB&I the Subcontract. Ristine replied that Ets-Hokin would want CB&I to do the prestressing, RTAP 81-82. However, negotiations with Ristine proved fruitless, RTAP 77-78. Ristine did not have the authority to award Sub-

contract, RTAP 202. Then Daniels began to negotiate with Bruni, a man who, he had concluded, had the power to award a subcontract to CB&I. The negotiations began in earnest, and the original subcontract price proposal began to change. Once again, with a definite subcontract price in mind, Daniels offered to supply a standby operator for the prestressing work if that would clinch the negotiations, RTAP 83. The testimony does not indicate that Bruni accepted the offer, RTAP 82-90. The Subcontract was not awarded at that time. At a later date, after the subcontract price was revised downward and CB&I had agreed to do an extra item of work, the Subcontract was awarded by Mr. Bruni. Ets-Hokin prepared the Subcontract using its standard form and adopting the language of a confirming letter from Mr. Daniels on the date Bruni agreed over a telephone to give CB&I the Subcontract. The Subcontract document itself was signed, not by Bruni, but by Robert Lauter, Executive Vice President of Ets-Hokin. Neither Bruni nor Lauter were called as witnesses by Ets-Hokin.

As finally constituted, the Subcontract Agreement consisted of the following documents:

a) The Ets-Hokin printed form of subcontract with typed attachment, Tr. 11-14.
b) The confirming letter from Daniels dated August 15, 1962. See Defendant's Exhibit D to RTAP.
c) The general conditions of the governing specifications No. DC 5750. (Not a part of this record)
d) Printed General Specifications of CB&I to be found as Exhibit 83 to RTAP.
e) Those pertinent paragraphs of the governing specifications No. DC 5750 which relate to Bid Schedule Items 129, 130 and that portion of Item 79 included in the Subcontract.

Given the fact that negotiations for the Subcontract extended over an approximate period of three months, and that the ultimate document was complex and fairly definitive, representing the "give and take" of such negotiations, including a revision downward of the original subcontract offer of $1,046,700.00 (Defendant's Exhibit F, RTAP) to $592,500.00, it can be seen that the arbitrators' imposition of a $16,850.45 liability upon CB&I based upon the oral offers outlined above constitutes a severe mauling of the Appellant's legal rights. The result seriously puts in question the value of written contracts and the rights of the Appellant to enforce its claim against the bond provided under the terms of the *Miller Act*.

Additionally, Appellant's procedural rights were prejudiced under the arbitration. It became the Appellant's burden to prove that the disputed work was not a part of the agreement between the parties. Normal court procedure would have required the Appellees, after Appellant had placed the Subcontract into evidence and established evidence as to its performance and the alleged wrongful retention of subcontract proceeds, to have proceeded with its defense; namely, that the Subcontract had not been performed, that prestressing was an obligation of the Appellant under the Subcontract, that Appellant had defaulted in this obligation and that, as a result, the Appellee Ets-Hokin had suffered XYZ amount of damages. Then, the Appellant would have proceeded to have put on its rebuttal evidence.

As it turned out, a great deal of Appellant's rebuttal evidence was exposed to Appellees and their witnesses before the Appellees were required to put on their case. This resulted from the cross-examination of Appellant's only intended witness in its case-in-chief, J. Graham Daniels,

upon matters outside of the scope of the direct examination and more directly pertinent to the Appellee's case, most of which Appellant argued then and argues now is based upon parol evidence, upon matters beyond the written contract. During the course of such cross-examination, much parol documentary evidence was brought up by the Appellees, as, for example, the Baldwin-Lima-Hamilton subcontract (RTAP, pages 29-31). In addition, Appellant was required, after the cross-examination of J. Graham Daniels, to put on the testimony of its rebuttal witness F. J. Kelly (RTAP 107-109). This was premature since Mr. Kelly's testimony was intended to be used primarily to rebut the testimony of Ets-Hokin's principal witnesses, Ristine and Barna. Indeed, if the parol evidence rule had been strictly applied, Appellant would probably not have used Mr. Kelly as a witness, unless it would have been to confirm Mr. Daniels' statements to the effect that CB&I had completed its performance under the Subcontract.

There is nothing quite so helpful to the adverse parties as telling them in advance how one proposes to rebut their evidence and testimony, particularly when much of the telling is done under the skillful cross-examination of the adverse parties. As the testimony of F. J. Kelly demonstrates, it was necessary for the Appellant, in anticipation of the Appellees' parol testimony to submit parol evidence of its own to controvert the anticipated evidence of the Appellees. Kelly's testimony involved itself primarily in technical explanations of prestressing and cooling and an explanation of events occurring during the performance of the work and after the execution of the agreement (Pages 109-177, RTAP).

In Federal Courts generally, the burden of proof has been characterized as a substantive right. *Moore: Federal*

Practice (1964 Ed.), Vol. 5, Par. 43.08. The right protected by the parol evidence rule is likewise a substantive right. Thus, Appellant's belief is that the procedural deficiencies of the arbitration hearing not only contributed to the confused findings and conclusions of the Arbitration Board, but to a diminishment of Appellant's substantive rights.

C. There Is No Substantial Judicial Authority for the Proposition That Miller Act Lawsuits Are Properly Referable to Arbitration Under the United States Arbitration Act.

The Fifth Circuit in *Electronic & Missile Facilities, Inc. v. Moseley*, supra, said that a subcontractor's *Miller Act* lawsuit could be stayed for arbitration; but the Supreme Court on appeal remanded the case for trial in the District Court on the issue of fraud in the inducement of the Subcontract without reaching or discussing the *Miller Act* issue or instructing the lower court how to handle the issue should the fraud charge be decided adversely to the Plaintiff (374 U.S. 167, 1963, P. 172-173). However, in a concurring separate opinion, Justices Warren and Black noted that the Court's disposition of the appeal "leaves open questions of great importance to laborers and materialmen who under the *Miller Act* are entitled to have their controversies settled in independent courts of law."

> "(1) Can a member of the special class of laborers and materialmen which Congress, in the public interest, has protected by fixing the venue for their claims under the Miller Act in a particular federal court deprive himself of that kind of remedy as a condition of his obtaining the employment or the purchase of his materials?
>
> (2) Can any person before any dispute has arisen, agree to arbitrate all future disputes he may (*374 US 173) have and *thereby lose his right to go to court to try his claim according to due process of law?

(3) Can the Arbitration Act, in light of its language and legislative history, be applied to laborers and materialmen or to construction projects subject to the Miller Act?

(4) Is a construction project, like the one in this case, one 'involving commerce' so as to come within the restriction scope of the Arbitration Act?".

The case of *Agostini Bros. Bldg. Corp. v. U. S. ex rel Virginia-Carolina Electrical Works, Inc.*, 142 F.2d 854 (4th Cir., 1944) did not concern itself with the question of any possible conflict with the Miller Act. The case involved an action by a subcontractor for labor and materials furnished and the District Court had denied a stay of proceedings on the ground that since the contract was not one involving maritime transactions or transactions within interstate commerce as defined in Section 2 of the Arbitration Act, the Act did not apply. The Fourth Circuit found that Section 3 of the Arbitration Act which provides for stays pending arbitration was not limited to the transactions defined in Section 2. The United States Supreme Court when faced with the apparent precedent of the *Agostini* case in its deliberations in *Wilko v. Swan*, 346 US 427, 435 decided that *Agostini* was not really a case in which arbitration proceedings would lessen the effectiveness of the claimant's remedy since it involved only a determination of the *amount* of money due under a contract.

U.S. ex rel, Trucco & Sons Co. v. Bregman Construction Corp., 256 F.2d 851 (7th Cir. 1958) was a Miller Act action by a subcontractor against his principal wherein the principal, Bregman sought arbitration under the subcontract. The District Court found that Bregman had waived his right to arbitrate by filing a previous action against the subcontractor Trucco's bonding company. The circuit court

sustained the district court. There was no issue or discussion of Miller Act priority over the Arbitration Act.

U.S. ex rel Seaboard Surety Company v. Electronic & Missile Facilities, Inc., et al., 206 F.S. 790 (District of Puerto Rico) met the issue of arbitration vs. Miller Act rights head on and decided on the basis of the *Agostini* Case, supra, and *U.S. ex rel, Air-Con, Inc. v. Alcon Development Corporation*, 271 F.2d 904 (Cir. 4, 1959) that the court was bound to grant the authority of Section 3 of the Arbitration Act. In view of the issues decided in the *Agostini* Case. it is difficult to see how the court concluded that the *Agostini* Case was precedent for the proposition that the Arbitration Act will prevail over the policies of the Miller Act and the rights of claimants thereunder.

In the *Air-Con, Inc. v. Alcon Development Corp.* Case, supra, under a contract arbitration clause very similar to the one in the Plaintiff's subcontract, the district court ordered a stay of proceedings pending arbitration which order was affirmed by the Fourth Circuit on appeal. While this was a Miller Act case:

> "The Defendants concede that the provisions of the Federal Arbitration Act (9 USC Sec. 1 through 14) are not applicable here and that, if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia."

Thus there was no issue in this case of Miller Act v. Arbitration Act.

In *U.S. ex rel Industrial Engineering and Metal Fabricators, Inc. v. Eric Elevator Corporation et al.*, 214 F.S. 947 (D.C. Mass., 1963), a Miller Act plaintiff moved to strike that portion of the defendant's defense which sought to stay proceedings pending arbitration pursuant to a subcontract

provision calling for arbitration in New York City. The plaintiff contended that the arbitration provision was invalid because it ousted the Federal Court of its jurisdiction and frustrated "the purpose of the Miller Act with its provision for bringing of suit in the district in which the contract was to be performed;" in this case, Massachusetts. The Court held that the Arbitration Act language was broad enough to encompass Miller Act suits and that the rights created by the Act could be subjected to an arbitration agreement unless the right was one "of a character inappropriate for enforcement by arbitration". The court found that the Supreme Court in *Wilko v. Swan,* supra, had approved Miller Act cases as the type of case "in which arbitration is not only appropriate but useful", and then proceeded to cite the *Air-Con, Inc., Bregman Construction Corp.* and *Agostini* cases as authority for the proposition that the provisions of the Arbitration Act are applicable to Miller Act cases. The court concluded that the plaintiff had:

> "offered no convincing argument that the Miller Act provision, even if for plaintiff's protection, cannot be waived by a free contract of the parties to arbitrate their differences at some other place. The Act gives the plaintiff the right to have his claims decided by the court. If, plaintiff can agree to waive this right and submit the case for decision by an arbitration tribunal, he should certainly be able to agree to have the arbitration take place outside the district".

The Massachusetts District Court reads too much into the Supreme Court's passing reference to the *Agostini* Case in noting that experience under the Arbitration Act "raises hope for its usefulness both in controversies based on Statutes or on standards otherwise created". It should be noted that in *Wilko v. Swan,* the Supreme Court went on to qualify this generous statement by saying that the hospitable

attitude of the Congress and the courts towards arbitration did not solve the question of the validity of the arbitration agreement involved in that case.

Further, the Massachusetts court in the *Eric Elevator Corporation* case clearly misinterpreted the holding of the *Agostini, Air-Con, Inc.* and *Bregman* cases; and, finally, it appears that the court and the parties were primarily concerned with the issue of venue, i.e. the right to have the issues decided in New York or Massachusetts. In the light of the facts of the present case, the court's reasoning is shallow, summary and unconvincing.

D. Federal Arbitration Act Does Not Apply Because the Controversy Here Is Not Referable to Arbitration as a Matter of Public Policy.

Public policy has on occasion been a ground for declaring a matter not referable to arbitration. Thus, in *Kingswood Management Corp. v. Salzman*, 70 NYS 2d 692 (1947), the New York arbitration law, upon which, according to *Zip Mfg. Co. v. Pep Mfg. Co.* 44 F2d 184, 185 (DC Del.—1930) the Federal Arbitration Act was patterned, was held inapplicable to a controversy involving an attorney's fee in a treble damage suit under the Federal Emergency Price Control Act.

> "The Emergency Price Control Act was adopted from urgent reasons of public policy which the Congress did not intend to turn over to private Arbitrators to administer. (P. 693)"

In *Application of Diamond*, 80 NYS 2d 465, 467 (Sup. Ct., 1948), aff'd 79 NYS 2d 924 (1948), a motion to stay a stockholder's derivative action in order that the controversy could be arbitrated was denied, on the ground, inter alia, that an agreement to arbitrate the issue there involved "would be unenforceable as against public policy".

In *Application of Cohen,* 52 NYS 2d 671 (Sup. Ct. 1944), aff'd 53 NYS 2d 467 (1945), a stay pending arbitration was denied in a proceeding to dissolve a closed corporation because of disagreement of the parties.

As a matter of public policy, arbitration under the New York Arbitration statute has been deemed inappropriate with respect to the custody of children and rights of visitation. *Hill v. Hill,* 104 NYS 2d 755 (Sup. Ct., 1951), and with respect to the distribution of a decedent's estate, *Swislocki v. Spiewak,* 75 NYS 2d 147 (1947).

Judge Tuttle of the Fifth Circuit Court of Appeals in *Electronic & Missile Facilities, Inc. v. United States,* supra, in reversing the decision of the District Court for the Middle District of Georgia which had denied a motion to stay a lawsuit pending arbitration, concluded that the Arbitration Act prevailed over the Miller Act in that instance for several reasons:

1. The clear congressional intent to favor arbitration of disputes as expressed in the Arbitration Act.

2. The lack of any Miller Act legislative history which would support the inference that in adopting the Miller Act "Congress meant to prohibit a laborer or materialman from voluntarily substituting the procedure of arbitration for his right to litigate in a Federal Court."

3. The lack of any demonstration of "how or why" the Miller Act Claimant would be prejudiced by having the particular dispute settled by arbitration rather than in the Court.

Judge Tuttle characterized the case before him as one particularly suitable for arbitration because it involved the "determination of the amount of money due under a contract" as opposed to the type of case like *Wilko v. Swan,*

supra where legal concepts such as "burden of proof", "reasonable care", "material fact" and issues such as the "intent" and "knowledge" of a person were involved. He indicated that he might be more willing to read into the Miller Act an exclusive right to have the claimant's rights determined in the Federal court if it could be shown that Miller Act disputes involved "complicated and sophisticated legal issues which cannot readily be resolved by Arbitrators untrained in the law", referring thereby to legal issues of the same genre as were involved in *Wilko v. Swan,* supra.

Judge Rives dissented from Judge Tuttle's majority opinion primarily on the grounds that, notwithstanding an arbitration provision in a subcontract, government contractors "were restricted in the kinds of agreements into which they might validly enter to those conforming to the public policy declared in the Miller Act", and the public policy of the United States, as expressed in the *Miller Act,* was and is to give every subcontractor and materialman not reimbursed for work done under a contract "an unqualified right to sue on the payment bond" (Judge Rives quoting from *U.S. ex rel Bryant Electric Co. v. Aetna Casualty & Surety Co.* 297 F.2d 665, 667-CA2, 1962).

A brief comparison of the issues to be arbitrated set forth in Appellees' Demand for Arbitration, Tr. 15-17, and the Findings and Award of the Arbitrators, Tr. 54-57, should convince the Court that the latter document has little relevancy to the former Demand and that an arbitration panel is not a suitable tribunal for the enforcement of Appellant's *Miller Act* rights in this instance. An examination of the record might give some indication to the Court how the arbitrators moved from the issues stated in the Demand to the issues resolved in their findings and

award, but we think it best to conclude merely that minds untrained in legal analysis and legal concepts were primarily responsible for the anomalous findings, conclusions and award.

The effort of the arbitrators to reconstitute the subcontract as it perhaps should in their view have been negotiated, may be praiseworthy from the standpoint of technical construction practices, but, if sanctioned by this Court, will certainly not only deprive Appellant of its subcontract rights, but also establish a precedent which will undermine the social and economic value of written contracts and extend the arbitration process into areas not contemplated by those who proposed the *Arbitration Act* to the Congress and as to which it is unsuitable.

It was not the intent of the Arbitration Act to encourage an ineffective or unfair means of resolving contract disputes, nor was it the intent of the *Miller Act* merely to provide a more efficient and rapid means of recovery for the subcontractor and materialmen. Both pieces of legislation must be interpreted to promote reasonable and just results. In *Wilko v. Swan*, supra, the Supreme Court concluded that stockholders' rights under the Securities Act of 1933 could not be entrusted to arbitrators as a matter of public policy and Appellant urges, in this appeal, that a subcontractor's *Miller Act* rights, dependent for their enforcement upon the correct application of rules of law, must as a matter of public policy, be adjudicated by a Court of law.

JURISDICTION OF ARIZONA DISTRICT COURT TO VACATE AWARD

Section 3 of the *Federal Arbitration Act* (9 USC 3) empowers the District Court in which a suit is brought "upon any issue referable to arbitration under an agree-

ment in writing for such arbitration", to stay the trial of the action until arbitration has been had in accordance with the terms of the written agreement. Under this Section the Court must make an initial determination that the issue between the parties is referable to arbitration.

Section 9 of the Arbitration Act (9 USC 9) says that if the parties to an arbitration agreement have agreed that a judgment of the Court shall be entered upon the Arbitration award, but do not specify the Court, then any party may make application to the United States District Court in and for the District in which the award is made. The language of this section is that an application "*may be made*" to such District Court, not "shall be made".

Section 10 of the Arbitration Act declares the District Court in and for the District in which "the award was made may make an order vacating the award upon the application of any party to the arbitration" where certain grounds exist. Section 11 of the Arbitration Act uses similar language in empowering such a District Court to modify or correct an arbitration award upon certain grounds.

None of the language used in the foregoing Statutory Sections suggests that jurisdiction conferred therein is exclusive. Admittedly, where there are no other grounds upon which a District Court could obtain jurisdiction for the purpose of enforcing, vacating, correcting or modifying an arbitration award, the only grounds upon which a party to an arbitration could invoke the power of a District Court would be the above statutory provisions, in which instance, such a party would be limited to the Federal District Court in and for the District in which the arbitration award was entered.

But what about the case where the party to an arbitration can invoke a District Court's jurisdiction on other grounds

e.g. where the amount involved is in excess of $10,000 and the parties are citizens of different states? In *Gaddis Mining Co. v. Continental Materials Corp.*, 196 F. Supp. 860 (D.C. Wyo.—1961) the Wyoming Federal District Court found no difficulty in determining that it had jurisdiction under 28 USC 1332 to entertain an action to enforce an arbitration award which had been entered in Colorado in an arbitration conducted under Colorado law pursuant to a purchase agreement executed in Colorado.

In the instant case, the Arizona District Court had jurisdiction to hear Appellant's claim under the provisions of 40 USC 270 b (b):

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed, and not elsewhere, irrespective of the amount in controversy in such suit . . ."

Had appellant not sought recovery below upon the bond provided by Appellee Ets-Hokin in compliance with the requirements 40 USC 270 a (a), it could have invoked the jurisdiction of the Federal District Court of Arizona under the provisions of 28 USC 1332, the so-called diversity of citizenship jurisdiction statute.

To the extent that the arbitration award in this case is valid it is also binding upon and enforceable against the bonding company, Appellee Travelers Indemnity Company; and to this extent, such an award would be, in effect, a determination of Appellant's Miller Act rights (40 USC 270), the forum for the proper determination of which rights is exclusively, under the statute creating them in the Arizona Federal District Court. Thus, if it is not necessary to construe Sections 9, 10 and 11 as conferring exclu-

sive jurisdiction upon the District Courts of those Districts in which an arbitration award is made for the purpose of confirming, vacating, modifying or correcting such award, it is not inappropriate or inconsistent to uphold the jurisdiction of other District Courts for the exercise of these powers where that jurisdiction can be invoked upon other statutory ground, as, for example 40 USC 270 or 28 USC 1332.

Except for those cases where the claim arbitrated cannot otherwise qualify for Federal jurisdiction, Sections 9, 10 and 11 of Arbitration Act should be more realistically viewed as venue provisions. Given this perspective in the instant case, the arbitration proceedings and award are really ancillary in character; and since the Arizona District Court has not only the jurisdiction but is the proper court venue wise with respect to the underlying dispute, it should be permitted to retain jurisdiction over the arbitration award. The idea is not radical. Professor Moore in his work on Federal Practice and Procedure (Second Edition), Vol. 1, page 1335 says it is an established rule that:

> "Where there are two or more federal grounds and venue is properly laid as to one ground, this venue will support adjudication of the other related ground or grounds"

An illustration of this principle is found in *Ferguson v. Ford Motor Co.* 77 F. Supp. 425 (DCSD NY—1948), an action charging a Sherman Act and Clayton Act violation (wherein proper venue was in the Southern District of New York) and a patent infringement (wherein proper venue as to the Ford Motor Co. was in the Michigan District Court). While the Court found that it could retain jurisdiction over the patent infringement charge because of the Ford Motor Co.'s effective presence in the Southern Dis-

trict of New York through its agents whose acts it controlled, the Court went on to say that even were its jurisdiction doubtful

> ". . . the fact that the first cause of action (the antitrust claim) will be retained here would lead us to retain jurisdiction for trial over the second (the patent infringement). It should be noted that approximately the same proofs will be made to substantiate each of the two alleged causes of action."

And Judge Kaufman in *Bradford Novelty Co. v. Manheim,* 156 F. Supp. 489 (DCSD NY—1957) by way of dictum approved this rule when he said:

> "Where the Court is properly vested with one cause of action embodying the principle of fundamental controversy between the parties, the Court may justifiably retain jurisdiction over ancillary or related matters."

Appellant sees no particular legislative purpose or Congressional policy to be served by requiring the award to be attacked in the instant case in the Federal District Court in and for the Northern District of California, and much common sense in permitting the Court which referred the dispute to arbitration in the first instance to review the award. This is not to argue that the Arizona District Court necessarily has exclusive jurisdiction, but that, at least, it has concurrent jurisdiction which, if invoked first, should prevail.

CONCLUSION

Appellant submits that it has demonstrated in this brief that the District Court in and for the District of Arizona was in error in that:

> 1. The Appellant should have been permitted to prosecute its claim against Appellees in the District Court pursuant to the rules of law governing civil

actions in such Court, notwithstanding a general congressional policy favoring the Arbitration of disputes arising under agreements containing an arbitration provision.

2. If the Appellant's Miller Act rights were not of overriding concern, then the Arizona District Court should have entertained Appellant's objections to the Arbitration Award.

Respectfully submitted,

RYLEY, CARLOCK & RALSTON

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK C. BROPHY, JR.